Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMITS	)	**FINAL**
40J-111302 and 40M-111303 BY USA	)	**ORDER**
(DEPARTMENT OF INTERIOR, BLM)	)	

* * * * * * * *

The Proposal for Decision (Proposal) recommending denial of both applications for permit was entered on April 10, 2001. Applicant filed timely exceptions to the Proposal. Objector also filed written exceptions, but since the applications are denied the exceptions are moot and will not be discussed here.

There are mistakes in Finding of Fact #3 of the 40J-111302 portion of the Proposal, and in Finding of Facts #3 and 8 of the 40M-111303 portion of the Proposal. These findings have a software error message "**Error! Bookmark not defined.**" in them. The error message should be replaced with "4" referring to page 4 in the three Findings of Fact.

Applicant excepts to the Proposal's Finding of Fact #5 that Applicant has not shown water is legally available for both applications. With respect to Application #40J-111302 for Wilson Coulee, Applicant takes exception with the Hearing Examiner's use of the Holman water right record documents (*DNRC Interview Report Form*). While it appears the Holman water records are not properly of record in this case, Applicant revealed the Holman right at hearing. Applicant did not explain how their project would not consume water needed to satisfy the Holman's downstream appropriation. Applicant

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asserts that it had no obligation to consider Holman's appropriation because Holman did not object. The DNRC, however, interprets Mont. Code Ann. § 85-2-311(1)(b) to require a consideration of all existing water rights in its analysis for legal availability. The statute says nothing about only considering those water rights that have objected.

Applicant also asserts that the legal availability analysis should be limited to three miles downstream because of the application instruction booklet. The statutory criteria do not limit the scope of the legal availability inquiry by distance. The analysis must extend as far as the area effected by the intended appropriation. Objector provided testimony that storm events can produce flows which can reach the Milk in drainages similar to these sources. Applicant's expert witness stated that under certain conditions this can occur. Applicant asserts but has not shown that a call from Objector would be futile. The Department must accept the Hearing Examiner's Findings of Fact if they are supported by substantial evidence in the record. Mont. Code Ann. §2-4-622 (3). Findings of Fact #5 will not be modified.

Applicant excepted to Finding of Fact #6 in both applications. Applicant appears to equate "no objections" with lack of adverse affect. Objections or not, the Applicant has the burden of showing there will be no adverse affect on a prior appropriator under an existing water right. Applicant did not make any showing that Holman's appropriation on Wilson Coulee would not be adversely affected, that other water rights on Cottonwood Creek and Beaver Creek would not be adversely affected, and did not overcome Objector testimony of storm event flows on the Unnamed Tributary of Cottonwood Creek. Finding of

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Fact #6 will not be modified.

Applicant excepted to Finding of Fact #7 in both applications for the same reasons that it excepted to the legal availability and adverse affect findings in the Proposals. The Proposals' Findings of Fact #7, however, state the drainage device is necessary to prevent appropriation of more water than requested. Further, and contrary to Applicant's assertions, Applicant has not established that all calls are futile. Absent that, the projects must be constructed with an ability to satisfy valid calls. Finding of Fact #7 will not be modified.

Applicant excepted to Findings of Fact #10 in both applications stating that the wildlife and waterfowl use is a subset of the fishery use. In combination, that is what findings of fact #9 and #10 state. However, the wildlife and waterfowl use is not quantified. Applicant's exception implies because DNRC has no recommendation for the quantity of water needed by fish or wildlife, no such showing is needed. However, it is the Applicant's burden to provide the quantity of water needed for the intended use, not the Department's. Findings of Fact #10 will not be modified.

THEREFORE, having given the Applicant's Exceptions full consideration the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law with the modifications made above, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

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ORDER-Application 40J-111302

Application For Beneficial Water Use Permit 40J-111302 BY USA (Department of Interior, BLM) is hereby **DENIED without prejudice.**

ORDER-Application 40M-111303

Application For Beneficial Water Use Permit 40M-111303 BY USA (Department of Interior, BLM) is hereby **DENIED without prejudice.**

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 13th day of SEPTEMBER, 2001.

Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Final Order was duly served upon all parties listed below this 14th day of September, 2001.

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HELENA MT 59620-1601

Jennifer L. Hensley
Hearings Unit

CASE #

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS 40J-111302 and 40M-111303 BY USA (DEPARTMENT OF INTERIOR, BLM)	))))	**PROPOSAL FOR DECISION**

* * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on November 16, 2000, in Glasgow, Montana, to determine whether a beneficial water use permit should be issued to USA (Department of Interior, BLM) for the above applications under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing by and through counsel John Chaffin. Huey Long, Soil Scientist, and Jenny Jennings, Hydrologist, appeared as witnesses for the Applicant.

Objector Glasgow Irrigation District (hereafter GID) appeared at the hearing by and through counsel Robert Hurley. Vern Steiner, former manager of GID; Lee Cornwell, area irrigator and GID Board member; Deby Murch, current GID manager; and John Lacey, area rancher and GID Board member were called to testify for the Objector.

Denise Biggar, Water Resources Specialist with the Glasgow Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Hearings Examiner.

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

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Applicant offered seven exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-7.

Applicant's Exhibit 1 is a USGS map, *Malta NW, Mont.* upon which the Wilson Coulee project and drainage area is sketched.

Applicant's Exhibit 2 is a paper copy of a digital photograph looking downstream of the Unnamed Tributary of Cottonwood Creek project site.

Applicant's Exhibit 3 is a paper copy of a digital photograph of the Unnamed Tributary of Cottonwood Creek project site showing the centerline of the proposed dam and the spillway location.

Applicant's Exhibit 4 is a paper copy of a digital photograph looking downstream of the Wilson Coulee project site.

Applicant's Exhibit 5 is a paper copy of a digital photograph looking downstream of the Wilson Coulee project (aka, Fish Feather) site.

Applicant's Exhibit 6 is a USGS map, *Pinks, Montana, provisional edition, 1984,* Upon which the Unnamed Tributary of Cottonwood Creek project site is circled.

Applicant's Exhibit 7 is a paper copy of a digital photograph showing Wilson Coulee downstream appropriator C D Cattle Company's (Mark Holman) diversion dike.

Objector offered 1 exhibit for the record. The Hearing Examiner accepted Objector's Exhibit 1.

Objector's Exhibit 1 consists of a three page copy from the *Rangeland Hydrology,* a publication of Society of Range Management. The pertinent portions are the circled paragraph on page one and the graph on the third of the three pages.

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PRELIMINARY MATTERS

At a prehearing conference the applications were consolidated. The consolidation is for convenience at the hearing; the subsequent order will combine information applicable to both applications; but will have separate findings of fact, conclusions of law, and proposed order sections.

At the hearing Applicant clarified that one of the intended purposes of the applications was that fisheries be included in the wildlife portion of the applications. This clarification appears to be an amendment to the application. The added use is not for an additional volume of water; but, merely describes the intended use better. The hearings examiner finds that existing water users and parties are not prejudiced by the clarification, and re-notice is not required.

After presentation of evidence by the parties, the Hearing Examiner found the record did not contain information that justified the quantities of water requested for the livestock, fishery, wildlife, and waterfowl proposed uses; and why the Applicant is the appropriate person to apply for water for area wildlife and waterfowl. The record was left open for Applicant to present evidence to address these specific shortfalls. Objector was then given until January 16, 2001 to respond to Applicant's post-hearing evidence. Both parties were then allowed until February 16, 2001 to present simultaneous written closing statements (for all matters in the record).

Applicant offered the requested additional evidence in the form of a two page affidavit from Kent Gilge dated December 14, 2000, and a two page declaration from Huey Long dated December 18, 2000, in a timely manner; they are a part of the record in this matter.

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The Hearing Examiner notes that Mr. Long's computation of stockwater needs from the reservoirs relies upon DNRC handouts. His declaration identifies stockwater needs as ".017AF/AUM" (animal unit month); the DNRC handout identifies stockwater needs as ".017AF/AUY" (animal unit year). Using Mr. Long's six (6) month (or .5 year) period of use and the DNRC handout version, the Hearings Examiner computed annual stock volumes. For the Wilson Coulee application, (170 AU) * (.017/AUY) * (.5 Year) = 1.45 acre-feet will be used; and for the Unnamed Tributary of Cottonwood Creek application, (117AU) * (.017/AUY) * (5/12 Year) = 0.83 acre-feet will be used. The original application and post hearing evidence state that the total proposed volume of the pond is needed to meet the intended purposes. Therefore, I subtracted the above calculated stock uses from the application total volumes to arrive at the volumes for the non stock uses in both ponds.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT-Application 40J-111302

1. Application for Beneficial Water Use Permit 40J-111302 in the name of USA (Department of Interior, BLM) signed by Clint Ulrich was filed with the Department on February 17, 2000. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

3. Applicant seeks to appropriate up to 21.5 acre-feet of water per year from Wilson Coulee at a point in NW¼SE¼NE¼ of Section 27, Township 31 North, Range 29 East, Phillips County, Montana. The proposed means of diversion is an onstream dam with a capacity of 21.5

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acre-feet. The proposed period of appropriation is January 1 through December 31, inclusive of each year. The proposed uses include stock use up to 1.45 acre-feet from May 1 through November 15, inclusive of each year; fishery, waterfowl, and wildlife up to 20.05 acre-feet from January 1, through December 31, inclusive of each year. The proposed place of use is a 21.5 acre-foot onstream storage reservoir within the NW¼SE¼NE¼ , NE¼SW¼NE¼, and SE¼NW¼NE¼ all in Section 27, Township 31 North, Range 29 East, Phillips County, Montana. (Department file, Applicant testimony, Preliminary Matters [above])

4. Applicant has proven water is physically available at the proposed point of diversion. The estimated runoff above the proposed dam that is not held back by upstream reservoirs is least 25.3 acre-feet. (Department file, testimony of Huey Long, and Jenny Jennings)

5. Applicant has not proven water is legally available. Applicant relies on an availability analysis extending for three miles below their project, and relies upon the understanding that a 1951 downstream facility (Holman's) has not passed water to downstream senior appropriators to show the water flowing at the proposed site has not reached the GID point of diversion since 1951. A "*DNRC Interview Report Form* in the Department records for water right 40J-W046658 states "..There is a headgate and pipe in the dike that diverts the water to the fields. No stored water is involved. The soil behind the dike is very gravelly. They use the water when it is available or it is lost into the soil. The headgate is always left open. The irrigation type is waterspreading because the fields are irrigated from the source whenever water is available." The record shows water flow from Wilson Coulee to the Milk River is dependent upon antecedent soil moisture and vegetation type in the flow channel. Objector has the facilities and need to put runoff from the source to

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beneficial use during the irrigation season. Applicant did not account for the Holman irrigation volume in their legal availability determination, nor did they explain why they needn't investigate potentially impacted uses beyond three downstream miles. (Department file, testimony of Huey Long, Jenny Jennings, Lee Cornwell, John Lacey, Department record W-046658)

6. Applicant has not proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. There are times when the proposal may appropriate more than what was requested, or receive a call from a downstream senior right; there is no way to pass any excess flows downstream. Applicant does not intend to install a drainage device to bypass water to senior downstream appropriators or water diverted in excess of the volume requested. A drainage device to release water upon the call of downstream senior appropriators is necessary for seniors to reasonable exercise their right as they have in the past during precipitation events. (Department file and records, testimony of Huey Long)

7. Applicant has not proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. There are downstream appropriators who can make use of runoff water from summer precipitation events. There will be years when the proposed structure can divert more water than the volume requested because consumptive use and evaporation will remove water from the reservoir which will have to be replaced by any precipitation event before water will flow downstream. The proposed dam has no way to pass through a runoff event when water levels are below full pool, and the structure has no way to release water to downstream seniors if the source is called. There is a Memorandum of Understanding (hereafter

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MOU) between the Applicant and the Bureau of Reclamation, co-owner of Objector's water right, that allows storage facilities that have no release structure. The record does not show that the Glasgow Irrigation District is a part of that MOU; it is not applicable here. (Department file, Department records, testimony of Huey Long, Denise Biggar)

8. Applicant has proven the proposed use of water for livestock is beneficial. The amount requested is reasonable according to the Department's general water requirements (Form 615 [R7/00]). (Department file, Preliminary Matters [page **Error! Bookmark not defined.**])

9. Applicant has proven the proposed use of water for fishery purposes is beneficial. In north central Montana reservoir depth is the most important parameter in developing and maintaining a fishery. A spillway depth of twenty feet (20') is recommended for sportfish reservoirs to maintain the necessary water depth, thermal protection, and oxygen for the fish throughout the year. The proposed project has an upstream design depth of 19.4 feet (19.4') and a pit in its bottom to provide the necessary depth. Applicant and Montana Department of Fish, Wildlife and Parks (hereafter DFWP) have an agreement wherein DFWP has committed to stock the proposed reservoirs with a quantity of fish that would optimize growth and sportfishery use in the impounded waters. The stocking rate will be 1500-2000 rainbow trout fingerlings. (Department file, Department records, Department file, Kent Gilge affidavit, Huey Long affidavit)

10. Applicant has not proven the proposed use of water for wildlife and waterfowl is beneficial. There are deer and other wild game in the area that will use water in unknown amounts from the proposed reservoirs. Applicant did not identify the quantity of water to be

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applied to waterfowl or wildlife use. (Department file, Department records, Department file, Kent Gilge affidavit, Huey Long affidavit)

11. Applicant has proven they have a possessory interest in the property where the water is to be put to beneficial use. The lands are owned by the United States and are administered by the Bureau of Land Management. (Department file, Applicant testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW-Application 40J-111302

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. Applicant has not met the criteria for issuance of a beneficial water use permit. *See* Findings of Fact 5, 6, 7, and 10. Mont. Code Ann. §85-2-311 (1999)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER-Application 40J-111302

Application For Beneficial Water Use Permit 40J-111302 BY USA (Department of Interior, BLM) is hereby **DENIED**.

FINDINGS OF FACT-Application 40M-111303

1. Application for Beneficial Water Use Permit 40M-111303 in the name of USA (Department of Interior, BLM) signed by Clint Ulrich was filed with the Department on February 17, 2000. (Department file)

2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.

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3. Applicant seeks to appropriate up to 20.3 acre-feet of water per year from an Unnamed Tributary of Cottonwood Creek at a point in SE¼SW¼SE¼ Section 03, Township 29 North, Range 32 East, Phillips County, Montana. The proposed means of diversion is an onstream dam with a capacity of 20.3 acre-feet. The proposed period of appropriation is January 1 through December 31, inclusive of each year. The proposed uses include stock use up to 0.83 acre-feet from May 1 through September, 30, inclusive of each year; fishery, waterfowl, and wildlife up to 19.47 acre-feet from January 1, through December 31, inclusive of each year. The proposed place of use is a 20.3 acre-foot onstream storage reservoir within the SE¼SW¼SE¼ and NE¼SW¼SE¼ all within Section 03, Township 29 North, Range 32 East, Phillips County, Montana. (Department file, Applicant testimony, Huey Long affidavit, Preliminary Matters [page **Error! Bookmark not defined.**])

4. Applicant has proven water is physically available at the proposed point of diversion. The estimated runoff to the proposed dam is at least 15.5 acre-feet per year; estimated evaporation from the proposed reservoir is three feet (3'), or about 8.5 acre-feet per year. It may take two years to fill the reservoir under average conditions. (Department file, testimony of Huey Long, Jenny Jennings)

5. Applicant has not proven water is legally available. Applicant's legal availability analysis only addresses uses three miles below the proposed project. Applicant did not show that calls from the downstream Objector would be futile because released water would not reach them. The record shows water flow from the source to the Milk River is dependent upon antecedent soil moisture and vegetation type in the flow channel. Objector has the facilities and need to put runoff from the source to beneficial use during the

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irrigation season. (Department file, testimony of Jenny Jennings, Lee Cornwell, John Lacey,)

6. Applicant has not proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. Applicant did not show calls from the downstream Objector would be futile because released water would not reach them. Probability of flows reaching the Objectors is dependent upon antecedent soil moisture and vegetation type in the flow channel; the record does not show the soil moisture or vegetation conditions would always prevent flows from reaching downstream tributaries. There are times when the water in the source may reach the GID's point of diversion at times when they have need for such water. A drainage device to release water upon the call of downstream senior appropriators is necessary for them to continue to reasonable exercise their right as they have in the past. Applicant does not intend to install a device which can pass an incoming precipitation event to downstream appropriators. (Department file and records, testimony of Huey Long, Jenny Jennings, Vern Steiner, Deby Murch, Lee Cornwell, John Lacey)

7. Applicant has not proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. There are downstream appropriators who can make use of runoff water from summer runoff events. There will be years when the proposed structure can divert more water than the volume requested because consumptive use and evaporation will remove water from the reservoir which will be replaced by a runoff event before water will flow downstream. The proposed dam has no way to pass through a runoff event when water levels are below full pool; the structure has no way to release water to downstream seniors if the source is called. There

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is a Memorandum of Understanding (hereafter MOU) between the Applicant and the Bureau of Reclamation, co-owner of Objector's water right, that allows storage facilities that have no release structure. The record does not show that the Glasgow Irrigation District is a part of that MOU; it is not applicable here. (Department file, Department records, testimony of Huey Long, Jenny Jennings, Vern Steiner, Lee Cornwell, John Lacy, and Denise Biggar)

8. Applicant has proven the proposed use of water for livestock is beneficial. The amount requested is reasonable according to the Department's general water requirements (Form 615 [R7/00]). (Department file, Huey Long affidavit, Preliminary Matters [page **Error! Bookmark not defined.**])

9. Applicant has proven the proposed use of water for fishery purposes is beneficial. In north central Montana reservoir depth is the most important parameter in developing and maintaining a fisheries. A spillway depth of twenty feet (20') is recommended for sportfish (sic) reservoirs to maintain the necessary water depth, thermal protection, and oxygen for the fish throughout the year. The proposed project has a design upstream depth of 13.6 feet (13.6') with a pit in its bottom to provide the additional necessary depth. Applicant and Montana Department of Fish, Wildlife and Parks (hereafter DFWP) have an agreement wherein DFWP has committed to stock the proposed reservoirs with a quantity of fish that would optimize growth and sportfishery use in the impounded waters. The stocking rate will be 1500-2000 rainbow trout fingerlings. (Department file, Department records, Department file, Kent Gilge affidavit, Huey Long affidavit)

10. Applicant has not proven the proposed use of water for wildlife and waterfowl is beneficial. There are deer and other wild game in

the area that will use water in unknown amounts from the proposed reservoirs. Applicant did not identify the quantity of water to be applied to waterfowl or wildlife use. (Department file, Department records, Department file, Kent Gilge affidavit, Huey Long affidavit)

11. Applicant has proven they have a possessory interest in the property where the water is to be put to beneficial use. The lands are owned by the United States and are administered by the Bureau of Land Management. (Department file, Applicant testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW-Application 40M-111303

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).

2. Applicant has not met the criteria for issuance of a beneficial water use permit. *See* Findings of Fact 5, 6, 7, and 10. Mont. Code Ann. §85-2-311 (1999)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER-Application 40M-111303

Application For Beneficial Water Use Permit 40M-111303 BY USA (Department of Interior, BLM) is hereby **DENIED.**

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties

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may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of April, 2001.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources and Conservation
PO Box 201601
Helena, Montana 59620-1601

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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Hearing Notice, Appointment of Hearing Examiner, and Discovery Order was served upon all parties listed below on this 10th day of April, 2001.

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